Office-Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS, CLERK

(3)

No. 84-647

In the Supreme Court of the United States

OCTOBER TERM, 1984

VAN DORN PLASTIC MACHINERY CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably exercised its discretion in determining that misrepresentations in a union campaign flyer did not justify setting aside a representation election.

2. Whether the Board properly considered all of the facts in determining that an employer violated 29 U.S.C. 158(a)(1) by interrogating employees about strike votes.

3. Whether an employer's statement that it would continue its unlawful refusal to bargain until ordered to cease and desist by the federal courts was protected by 29 U.S.C. 158(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 736 F.2d 343. The National Labor Relations Board's decision and order (Pet. App. A18-A31) are reported at 265 N.L.R.B. 864.

JURISDICTION

The judgment of the court of appeals (Pet. App. A42-A47) was entered on July 23, 1984. The petition for a writ of certiorari was filed on October 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 22, 1977, petitioner's production and maintenance employees voted to be represented by District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) (Pet. App.

A2). Petitioner filed timely objections to the election, asserting, among other things, that on the day of the election the Union distributed a flyer containing what purported to be a copy of one of the Union's contracts with another firm, but which in fact was a forgery. Petitioner asserted that the flyer misled its employees into believing that the Union had obtained favorable wage rates and benefits for other employees. Pet. App. A33; Supp. App. S27.

On May 27, 1977, the Board's Regional Director issued a report recommending that petitioner's objections be overruled and the Union certified. In making this recommendation the Regional Director applied the standard announced by the Board in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), which provided that representation elections would be overturned on the basis of misleading campaign statements only if the statements involved the use of "forged documents which render[ed] the voters unable to recognize the propaganda for what it is." *Id.* at 1313 (footnote omitted). The Regional Director found that the flyer in this case was not a forgery because it is not an exact reproduction of a portion of a collective bargaining agreement but merely a collection of excerpts that have been juxtaposed for convenience (Pet. App. A33; Supp. App. S32).

On January 17, 1978, the Board adopted the Regional Director's findings and certified the Union as the exclusive bargaining representative of petitioner's production and maintenance employees (Pet. App. A39-A40). When petitioner refused to bargain or to supply relevant bargaining information requested by the Union (see Supp. App. S17-S18), the Board's General Counsel issued a complaint alleging that these refusals violated petitioner's obligation under Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) (29 U.S.C. 158(a)(5) and (1)) to bargain in good faith.

2. While this complaint was pending, the Union held two strike votes among bargaining unit employees (Pet. App. A15; Supp. App. S61-S62). Prior to the first vote one of petitioner's foremen told Thomas Vale, a member of the Union negotiating committee, that petitioner's president never would recognize the Union, and that a strike would be fruitless (Supp. App. S65-S66). Also before the first vote, petitioner's vice president, William Sheffield, asked Vale, in the presence of other employees, if the employees were going to strike. When Vale answered affirmatively, Sheffield stated that the employees did not need a union and that there was no point in striking. Sheffield made a similar inquiry before the second vote, and again stated that the employees should avoid a strike and "let the Union fight it out in court." Supp. App. S62-S63. Finally, before the second vote petitioner's president, Sam Smith, sent a letter to all employees stating that petitioner "would not bargain with the Union until the Federal Courts have determined whether the election was a fair one" (Pet. App. A59; Supp. App. S64-S65).

Following these developments, the Board's General Counsel issued another complaint, this one alleging that the comments by Sheffield and the foreman and the letter from Smith restrained and coerced petitioner's employees in violation of Section 8(a)(1) of the Act. These allegations were consolidated with the pending refusal-to-bargain complaint. Supp. App. S2-S3.

3. While both sets of complaints were pending before an administrative law judge, the Board overruled its *Shopping Kart* standard for assessing the impact of campaign misrepresentations, returning to the standard set out in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). See *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). Under the *Hollywood Ceramics* approach, substantial misrepresentations may provide grounds for setting aside an election.

Applying this standard to the facts as set out in the Regional Director's report, the judge decided that the Union campaign flyer was misleading. This finding, the ALJ concluded, required overturning the election, although he also found that petitioner's foreman and vice president had unlawfully interrogated, restrained and coerced employees through their conversations with Vale. Pet. App. A32-A37. On the General Counsel's appeal, however, the Board remanded the case to the ALJ for further factual findings.

On remand, the ALJ determined that the misstatements in the Union flyer were relatively minor and could not reasonably be thought to have had a significant impact on the election. The judge accordingly ruled that the election need not be overturned, that petitioner unlawfully had refused to bargain and to supply information, and that Smith's letter to petitioner's employees also was unlawful because petitioner "was under [a] present legal obligation to bargain with the Union." Supp. App. S161-S164.

While exceptions to the ALJ's supplemental decision were pending, the Board again changed its standard concerning misrepresentations made during representation campaigns, returning to the *Shopping Kart* standard. *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982). Applying this standard, the Board adopted the judge's finding that the Union's campaign flyer did not require overturning the election. Pet. App. A20. The Board also adopted the judge's findings, conclusions and order with respect to the other violations at issue in this petition (*id.* at A20-A21).

4. In relevant part, the Court of Appeals affirmed the Board's factual findings and enforced its order.[1] Citing

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[1]The court of appeals overturned a Board finding that petitioner had unlawfully implemented a new attendance control system; it remanded for further proceedings on the question whether petitioner had unlawfully implemented a new lunch period policy (Pet. App. A10-A14).

NLRB v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946), the court noted that the Board "enjoys a particularly broad discretion 'in establishing the procedure and safeguards necessary to [e]nsure the fair and free choice of bargaining representatives by employees' " (Pet. App. A7). The court therefore followed the lead of several other courts of appeals in holding that the Board had acted within its discretion in adopting the *Midland National Life* standard (Pet. App. A9), agreeing with the Board that elections should not be set aside "on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made" (*ibid.*).[2] On the facts of this case, the court of appeals endorsed the Board's conclusion that the Union flyer did not constitute a forgery (Pet. App. A6-A7). The court also found the Board's unlawful interrogation, restraint, and coercion findings to be supported by substantial evidence (*id.* at A14).[3]

ARGUMENT

1. Exercising its broad discretion to establish procedures to ensure free choice of bargaining representatives (see *A.J. Tower*, 329 U.S. at 330), the Board has determined that it "will no longer * * * set elections aside on the basis of misleading campaign statements" but "will [only] intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life*, 263 N.L.R.B. at 133 (footnote omitted). Every circuit that has passed on the issue has approved the Board's use of this standard. See, *e.g.*, *NLRB*

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[2]The court of appeals reserved judgment on the propriety of applying the *Midland National Life* rule to situations where "no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth * * *." Pet. App. A9.

[3]One judge dissented in part on this factual issue (Pet. App. A17).

v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983); *NLRB* v. *Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983); *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358, 1363-1364 (4th Cir. 1983); *NLRB* v. *Rolligon Corp.*, 702 F.2d 589, 594-595 (5th Cir. 1983); *NLRB* v. *Milwaukee Brush Mfg. Co.*, 705 F.2d 257, 258 (7th Cir. 1983); *NLRB* v. *Monark Boat Co.*, 713 F.2d 355, 360-361 (8th Cir. 1983); *NLRB* v. *Yellow Transportation Co.*, 709 F.2d 1342, 1343 (9th Cir. 1983); *NLRB* v. *DPM of Kansas, Inc.*, No. 83-1542 (10th Cir. Sept. 24, 1984); *Certainteed Corp.* v. *NLRB*, 714 F.2d 1042, 1052-1060 (11th Cir. 1983).[4]

Petitioner contends (Pet. 16-20), however, that this Court should review the propriety of the Board's test because the Board has altered the applicable standard three times in seven years. There is no merit to this contention. The appropriate standards for the conduct of representation elections are matters committed to the Board's discretion. While the Board must apply its established rules uniformly, it is free to change those rules if it determines that doing so will further the policies of the Act. Cf. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975). The Board made just such a determination in *Midland National Life*.

2. Petitioner's additional contention (Pet. 10, 11-14) that the court of appeals erred in failing to assess the lawfulness of Sheffield's remarks to Vale under the standard enunciated by the Board in *Rossmore House*, 269 N.L.R.B. No. 198 (Apr. 25, 1984), or in failing to remand the issue to the

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[4]While the Sixth Circuit here and the First Circuit in *NLRB* v. *New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1983) reserved judgment on whether the *Midland National Life* rule properly may be applied in particularly egregious cases of misrepresentation, petitioner does not contend that this case involves a misrepresentation of that magnitude. Indeed, the court of appeals had "no hesitation" in applying the rule to the facts here (Pet. App. A9).

Board for reconsideration in light of *Rossmore House,* is equally without merit. Petitioner asserts (Pet. 11) that the Board applied a per se rule to find that Sheffield's questions violated the Act. This was improper, petitioner continues, because use of a per se approach was rejected in *Rossmore House.*[5] In so contending, however, petitioner misapprehends the basis of the Board's ruling. The administrative law judge, whose decision in this regard was adopted by the Board, did not rely on a per se test in concluding that Sheffield's questions interfered with protected rights. Instead, the judge examined the circumstances surrounding the interrogations, noted that Sheffield's questions "were not isolated" incidents, and relied upon *Cagle's, Inc.,* 234 N.L.R.B. 1148, 1150 (1978) (where the Board found a similar interrogation improper "when viewed in the context of * * * other unlawful conduct") in finding that the interrogation amounted to a violation. Supp. App. S64. Reconsideration in light of *Rossmore House* therefore was unnecessary.[6]

3. Petitioner's final contention (Pet. 20-24) — that Smith's letter constituted speech protected under Section 8(c) of the Act (29 U.S.C. 158(c)) — was not addressed by the court of appeals and does not warrant review by this

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[5]In *Rossmore House,* the Board, overruling its decision in *PPG Industries, Inc.,* 251 N.L.R.B. 1146 (1980), rejected a "*per se* approach" to "evaluating whether interrogations [of open and active union supporters about their union sentiments] violate the Act * * * ." Rather, the Board announced that the appropriate test is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House,* slip op. 4.

[6]Contrary to petitioner's implication (Pet. 11), the Board did not rely on *PPG Industries* in finding Sheffield's interrogations unlawful. That case was decided five months after the ALJ issued his decision here, and it was not cited by the Board when it adopted the judge's findings (Pet. App. A20). The Board's decision to reverse *PPG Industries* in *Rossmore House* therefore does not require reconsideration of this case.

Court. As petitioner acknowledges (Pet. 21), *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969), established that statements by employers are protected under Section 8(c) only if they do not infringe the "equal rights of the employees to associate freely." Whether an employer's statement improperly interferes with the exercise of employee rights must be determined within the "context of its labor relations setting." 395 U.S. at 617.

Here, the Smith letter was sent to employees after the Board had overruled petitioner's election objections and had certified the Union — a time when, as the Board found, petitioner "was under present legal obligation to bargain with the Union" (Supp. App. S164). The letter followed statements by petitioner's foreman and vice president that Smith would not recognize the Union. And the letter was sent only three days before the second strike vote. In these circumstances, the Board could reasonably have found that Smith's letter tended to interfere with, restrain and coerce employees in the exercise of their right to select a bargaining representative and bargain collectively. Petitioner has offered no reason to doubt the Board's factual conclusion on this point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985

DOJ-1985-01